Petition

81-1913

Supreme Court, U.S.
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No. ....
IN THE

Supreme Court of the United States

October Term 1981

INTERNATIONAL MEDICATION SYSTEMS, LTD.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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QUESTION PRESENTED.

1. Whether under Rule 301. Federal Rules of Evidence and this court's decision in *Texas Dept. of Community Affairs v. Burdine*, ... U.S. ...., 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) the Ninth Circuit misconstrued and accordingly misapplied the effect of the rebuttable presumption of majority status enjoyed by an incumbent union.

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Certification Required by Supreme Court Rule 21.1(b).

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner, International Medication Systems, Ltd., prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 14, 1981.

OPINIONS BELOW.

The memorandum decision of the Court of Appeals enforcing a decision and order of the National Labor Relations Board ("Board") is not officially reported under Ninth Circuit Rules of Court and appears as Appendix A hereto. The decision and order of the Board which includes the recommended decision and order of the Administrative Law Judge ("ALJ") is reported at 253 NLRB No. 120 (1980) and appears as Appendix B. The Denial for Rehearing En Banc appears as Appendix C.

JURISDICTION.

The judgment and order of the Ninth Circuit Court of Appeals was entered on December 14, 1981. Petition for Rehearing En Banc was denied on March 8, 1982. On March 25, 1982, the Court of Appeals granted Petitioner's motion for a stay of mandate pending disposition of this petition for writ of certiorari to the United States Supreme Court, such petition to be filed with this court on or before April 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED.

United States Code, Title 29:

> Section 158(a)(5): It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a).
>
> Section 159(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

Rule 301 of the Federal Rules of Evidence ("Rule 301"):

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

STATEMENT OF FACTS.

This case has its beginning in an unfair labor practice charge filed against the Petitioner on December 21, 1978. Subsequently, on January 31, 1979, the General Counsel for the National Labor Relations Board ("Board") issued a complaint and notice of hearing alleging that Petitioner had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (61 Stat. 136.73, Stat. 519, 29 U.S.C. § 151, *et seq.*) ("Act"), by engaging in dilatory tactics during the course of negotiations with the Union[1] and by withdrawing recognition from the Union.

With respect to the withdrawal of recognition allegation, the General Counsel for the Board, as is often done, invoked the rebuttable presumption of the Union's majority support. This presumption, coupled with Petitioner's withdrawal of recognition, established a *prima facie* case of refusal to bargain. The General Counsel introduced no evidence on the issue of continued majority support of the Union by employees, but rather relied solely on this presumption.

The Petitioner's negotiator, however, testified that he doubted that the Union represented a majority of the employees and testified as to five objective factors which existed at the time he withdrew recognition of the Union. Those factors included the abandonment of the bargaining committee by the employees on that committee, the resulting unfilled vacancies on that committee, the absence of any Union meetings with employees for six months prior to the withdrawal, the failure of the Union to take the employer's last offer to the membership as required by its own constitution and the failure on the part of the Union to take im-

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[1]California Teamsters Public, Professional and Medical Employees, Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

mediate affirmative action to represent Petitioner's employees once Petitioner had declared its doubts as to the Union's majority status.

Following a hearing on the issues raised by the complaint and answer, the Administrative Law Judge ("ALJ") issued a decision dated August 14, 1980, in which he found that Petitioner had not engaged in dilatory tactics. The ALJ did, however, find that Petitioner improperly withdrew recognition. In this regard, the ALJ commented that:

> Here, it was [Petitioner's] burden to establish that it had doubt of the Union's majority status, based upon the fact of lack of such status, or upon objective considerations advanced in good faith.

Accordingly, the ALJ concluded that Petitioner violated Sections 8(a)(1) and (5) of the Act.

The Board issued its decision and Order on December 18, 1980, and adopted the ALJ's findings and recommendations without any substantial analysis or comment.

In response to Petitioner's refusal to comply with the order of the Board, the Board thereafter commenced enforcement proceedings before the Ninth Circuit Court of Appeals.

THE DECISION OF THE COURT OF APPEALS.

The Ninth Circuit enforced the order of the Board.

In response to Petitioner's argument that under the case of *Texas Dept. of Community Affairs v. Burdine, supra*, the Petitioner need only assert some legitimate reason in order to rebut the presumption of majority support, the Ninth Circuit Court of Appeals stated:

> We assume, but do not expressly decide, that the analysis of *Burdine* is similarly applicable to the Board's proceedings in refusal to bargain cases involving the presumption of majority support. We con-

> clude, however, that our prior decisions, and our decision here, are entirely consistent with *Burdine*.

Although the Ninth Circuit failed to expressly enunciate or describe the quantum of proof it would require of an employer to successfully rebut the presumption enjoyed by a union of continued majority status, it has done so in a number of recent cases, *N.L.R.B. v. Tahoe Nugget*, 584 F.2d 293, 297 (9th Cir. 1978), and *N.L.R.B. v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1978). As stated in *Tahoe Nugget*:

> The presumption is rebutted if the employer shows, by clear, cogent, and convincing evidence that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal.

The memorandum decision of the court in this case makes citation to *N.L.R.B. v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 998 (9th Cir. 1981) and *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, ... U.S. ... (1981). These cases impose the clear, cogent and convincing evidence requirement or in turn cite the Ninth Circuit's leading case in this area, *Tahoe Nugget, supra*.

REASONS FOR GRANTING THE WRIT.

I.

THE "CLEAR, COGENT, AND CONVINCING" STANDARD AS ADOPTED BY THE COURT BELOW IS PLAINLY CONTRARY TO THIS COURT'S INTERPRETATION OF RULE 301.

Petitioner submits that the burden to rebut a presumption by clear, cogent and convincing evidence is a misconstruction of the applicable law governing the allocation of the burden of proof under Rule 301.

As the NLRB itself, in *Stoner Rubber Company, Inc.*, 123 NLRB 1440 (1959), has observed, "it is elementary that in a refusal to bargain case the General Counsel has the burden of proving the union's majority." Under certain circumstances such as those which are present here, the General Counsel can invoke a rebuttable presumption of the majority status to make out a *prima facie* case of unlawful refusal to bargain.[2]

Prior to this court's decision in *Burdine, supra,* there was some legitimate reason for confusion in regard to the quantum of evidence required to rebut a presumption, *see,* Morgan, *Basic Problems of Evidence,* 34-37 (1961). In *Burdine,* however, this Court clarified the effect of Rule 301 in the context of a Title VII case. Rule 301 provides in pertinent part that "[a] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk

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[2]Under the rule first set out by the Board in *Celanese Corp. of America,* 45 NLRB 664 (1954), and subsequently adopted by this court in *Brooks v. N.L.R.B.*, 384 U.S. 96 (1954), a union enjoys a rebuttable presumption of majority status following expiration of the initial certification year. During the certification year the presumption is irrebuttable.

of non-persuasion. . . ." At issue in *Burdine* was the effect of a *prima facie* showing of discrimination in accordance with the guidelines set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Understanding the phrase "*prima facie* case" to denote creation of a legally mandatory rebuttable presumption and citing Rule 301, this court in *Burdine* noted that,

> [T]he nature of the burden that shifts to the defendants should be understood in light of the plaintiff's ultimate and intermediate burdens. *The ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff.* (Emphasis added.)

The Court went on to explain that the burden that shifts to the defendant as a result of the evidentiary presumption is one of rebutting the presumption by producing evidence *sufficient to raise a genuine issue* of fact, not one of persuasion.

The Court criticized the test of the Fifth Circuit by stating:

> "It is plain that the Court of Appeals required much more: it placed on the defendant the burden of persuading the court that it had *convincing objective reason* for preferring the chosen applicant above the Plaintiff." (Emphasis added.)

Once the defendant raised a genuine issue of fact the burden then shifted to the plaintiff to produce evidence to prove by a preponderance of the evidence the ultimate issue.

In two other recent cases, this Court has been careful to distinguish between producing evidence which convinces the trier of fact and the mere introduction of evidence which raises a genuine issue of fact. In *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), this court held that the Court of Appeals erred by placing too great a burden on the employer to rebut the presumption of discrimination raised by the plaintiff. That decision held that to dispel the pre-

sumption of discrimination, the employer need only ". . . *articulate* some legitimate, non-discriminatory reason for the employee's rejection." In the case of *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), this court remanded a case because in a Title VII discrimination action, the Court of Appeals stated that the employer was required to rebut a *prima facie* showing of discrimination by proving absence of discriminatory motive. This Court stated that the employer need not prove its absence of discrimination but need only articulate some legitimate non-discriminatory reason. The Court carefully distinguished articulating a reason from the impermissible heavier burden of proving absence of discriminatory motive.

While this Court's discussion of the evidentiary presumption in *Burdine* arose in a context different from that present here, the discussion applies with equal force to the present context. The Board is required by statute to conduct its hearing "so far as practicable" in accordance with Federal Rules of Evidence, 29 U.S.C. §160(b). This statutory requirement has been construed by the courts to allow the Board some leeway in applying the Federal Rules of Evidence but to preclude easy escape from the mandate of those rules. Accordingly, the Board cannot simply ignore applicable rules of evidence. Rather, the Board must at least address the evidentiary issues raised by any rule which the Board refuses to follow, *Teamsters Local Union 769 v. N.L.R.B.*, 532 F.2d 1385 (D.C. Cir. 1976).

Indeed, the quantum of evidence needed to rebut a presumption and the burdens of proof allocated therein have arisen as issues under both the Act and Title VII of the Civil Rights Act of 1964. The Tenth Circuit, for example, has been vigilant to ensure that the Board does not give too great an effect to a presumption under Rule 301. In *Presbyterian St. Lukes Medical Center v. N.L.R.B.*, 653 F.2d

450 (10th Cir. 1981) the Tenth Circuit held that the Board's determination that a unit restricted to registered nurses was presumptively appropriate violated Rule 301. The court there found that a presumption under Rule 301 merely shifted the burden of persuasion to rebut the presumption, but did not shift the ultimate burden of proof. As applied by the Board, "application of the presumption employed here violated the mandate of Rule 301. Such a presumption cannot be used to alter the General Counsel's burden to establish by a preponderance of evidence that an unfair labor practice has occurred." The court there also recognized that the Ninth Circuit took a contrary position on the effect of a rebuttable presumption under Rule 301, and noted that, "To the extent that *N.L.R.B. v. Tahoe Nugget, Inc., supra*, is contrary, we decline to follow it." Accord, *Beth Israel Hospital and Geriatrics Center v. N.L.R.B.*, ... F.2d ..., 107 LRRM 3214 (10th Cir., No. 80-1942, July 20, 1981), and *St. Anthony Hospital Systems v. N.L.R.B.*, 655 F.2d 1028 (10th Cir. 1981). Petition for rehearing *en banc* granted, January 5, 1982. But cf. *Big Y Foods Inc. v. NLRB*, ... F.2d ..., 107 LRRM 2971, 2974-2975 (1st Cir. No. 80-1578, 1981).

Similarly, the First Circuit, in *N.L.R.B. v. Wright Line*, 662 F.2d 899, (1st Cir. 1981) was vigilant to ensure that the Board did not give too great an effect to presumptions. There, the court upheld the Board's adoption of a "but for" test for determining whether an employer's discharge of a union activist violated the Act, but the court adjusted the method and allocation of proof by which the Board applied the new test. On the burden of proof employed in such cases, the court stated:

> [T]he general counsel's initial prima facie showing creates a kind of presumption that an unfair labor practice has been committed. At this point the employer

> risks losing his case unless he rebuts the presumption with evidence of his own. The Board may properly recognize this by stating that the employer . . . now comes under a "burden" to produce evidence of a "good" reason for the discharge. The imposition of this limited burden, however, does not shift to the employer the burden of proving that an unfair labor practice has not occurred. Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as "the burden of going forward with evidence to rebut or meet the presumption" and distinguishes this duty from "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party upon whom it was originally cast. . ." Thus, the employer in a §8(a)(3) discharge case has no more than the limited duty of producing evidence to challenge, not to outweigh, the evidence produced by the general counsel. *NLRB v. Wright Line, supra,* at 905. (citation omitted).

The quantum of evidence sufficient to establish a reasonable doubt and thus rebut the presumption of majority is under the current Ninth Circuit approach clearly in conflict with this court's pronouncements on the effect of a rebuttable presumption under Rule 301. The Ninth Circuit's clear, cogent, and convincing evidence standard in effect requires that an employer cannot establish loss of majority through evidence of conduct sufficient to raise an inference of majority loss, but must demonstrate actual loss or express repudiation by the employees. Further, by placing such an exacting burden upon Petitioner, the Ninth Circuit has lost sight of the fact that it is the General Counsel, not the respondent, who has the burden of proof to show an unfair labor practice, and in this context, that the Union did, in

fact, still represent a majority of employees at the time the employer withdrew recognition of it.

Burdine makes it clear that where the plaintiff has the burden of proof and relies on a rebuttable presumption and the defendant introduces a genuine issue of fact then the plaintiff must move forward to show that the facts presented by the defendant are not true.

In the circumstances of this case using the *Burdine* standard the General Counsel began the case with a rebuttable presumption of the Union's majority status. Petitioner introduced testimony that it had a good faith doubt of the Union's majority status and introduced five factual issues upon which it based that doubt. The burden was then on the General Counsel to introduce facts which would show either that the evidence introduced by Petitioner was not true or that in fact the Union did represent a majority.

In this case Petitioner produced considerable evidence to support its good faith doubt of the Union's majority status at the time it withdrew recognition. Petitioner introduced evidence of the Union's failure to hold union meetings, its loss of employee representatives from the bargaining committee, its failure to reappoint any members, its unwillingness to take Petitioner's last offer to the employees as required by its constitution and its failure to respond to Petitioner's challenge to its majority status. Under the *Burdine* test the Petitioner's evidence clearly raised the issue of fact of Petitioner's good faith doubt of the Union's majority. The presumption therefore disappeared and the burden was placed on the General Counsel to show that the Petitioner did not have a good faith doubt. Since the General counsel proffered no evidence the Board and the court should have found that he failed in his burden of proof.

Insofar as the Ninth Circuit used a test which is inconsistent with Rule 301 as interpreted by this court in *Burdine*, this court should grant certiorari to resolve the conflict between its decision in *Burdine* and the Ninth Circuit's Order. In the alternative, Petitioner prays that this court summarily remand the case to the Ninth Circuit or the Board to decide the case consistent with *Burdine*.

II.

THERE IS A CONFLICT WITHIN THE CIRCUIT COURTS OF APPEAL REGARDING THE QUANTUM OF EVIDENCE REQUIRED TO OVERCOME THE PRESUMPTION OF MAJORITY SUPPORT.

A. The Court of Appeals for the Second, Fifth and Ninth Circuits Require Clear, Cogent and Convincing Evidence to Rebut the Presumption.

In *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489-90 (2nd Cir. 1975) the Second Circuit found that in order to establish a good faith doubt of the union's lack of majority support the employer must ". . . present clear and convincing evidence of loss of union support capable of raising a reasonable doubt of the union's continuing majority." There, the court agreed with the Board's determinations that the remarks of at least six of fourteen employees which strongly indicated dissatisfaction with the union, lack of interest in union activities and a disinclination on the part of many employees to even join the union was not sufficient evidence to rebut the presumption of majority support.[3] The court noted that the Respondent failed to meet the clear and convincing test in this case, and that if an

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[3]The court also there approved of the Board's ruling that the employer could not subpoena union membership and financial records to determine majority status of the union on the basis that the information would be irrelevant, despite the fact that the union would be in a better position to know the true strength of its support.

employer does cease bargaining, he must be prepared to meet that standard of proof to justify his actions.

The Fifth Circuit has similarly required of an employer a high standard of proof to justify withdrawal of recognition of the union. In *NLRB v. A. W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981) the Fifth Circuit found that in order for an employer to rebut the presumption of majority status it must show by ". . . clear and convincing evidence that it had a good-faith doubt as to the union's continuing majority support." There, the employer adduced evidence of lack of majority support in the form of a company conducted poll of employees by secret ballot in which a majority of employees voted against representation by the union.[4]

Despite this strong evidence to support its good faith doubt of majority support, the Court found that the employer had not met its standard of proof in the case.

Finally, the Ninth Circuit in *NLRB v. Tahoe Nugget, Inc., supra,* held that the presumption of continued majority support is rebutted if the employer shows, by clear, cogent, and convincing evidence that the union was in the minority or that the employer had a good faith doubt of majority support at the time of the refusal. Significantly, the court there acknowledged that the presumption as used by the Board obviates an evidentiary showing of majority status.

Seven factors were relied upon by the employer in *Tahoe Nugget, supra,* in support of its good faith doubt of majority status: employee discontent, turnover of the employees in the unit, union inactivity over a period of years, low membership, financial difficulties of the union, bargaining history and admissions. Despite this evidence, the court af-

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[4]The court held that the employer conducted poll was not an independent unfair labor practice and accordingly was probative on the issue of majority support.

firmed the Board's determination that the employer had not met its burden to rebut the presumption of majority support.

The Second, Fifth and Ninth Circuit's clear, cogent and convincing evidence standard in effect requires that an employer cannot establish a good faith doubt of loss of majority through evidence of conduct sufficient to raise an inference of majority loss, but must demonstrate actual loss or express repudiation by the employees.[5] As the Fifth Circuit's decision in *A. W. Thompson, supra*, makes clear, even evidence in the form of a lawful poll of employees which indicates that a majority no longer wish representation would not suffice to rebut the presumption of majority support.

By placing such an exacting burden upon a respondent, these Circuits have lost sight of the fact that it is the General Counsel, not the respondent, who has the burden to show that the union did, in fact, still represent a majority of employees at the time the employer refused to bargain.

B. In Contrast to the Second, Fifth and Ninth Circuits, the Third, Sixth, Eighth and D.C. Circuits Require That an Employer Have Reasonable Doubts to Rebut the Presumption of Majority Support.

The Third, Sixth, Eighth and D.C. Circuits have taken the position, however, that insomuch as actual proof of majority support is so peculiarly within the special competence of the union, production by the employer of evidence sufficient to cast a doubt on the union's majority

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[5]Under the good faith doubt test, the Board would relieve an employer of the duty to bargain, even upon demonstration of the union's actual majority, *N.L.R.B. v. Ben Suthler, Inc.*, 395 F.2d 28 (6th Cir. 1968) (even if in fact the union actually represented a majority of the employees in the bargaining unit, the company would still have a complete defense if it had a good faith doubt about such representation), *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328, 332 (6th Cir. 1973).

status with a reasonable basis in fact would cause the presumption to lose its force.

In *Automated Business Systems v. N.L.R.B.*, 497 F.2d 262 (6th Cir. 1974) the Sixth Circuit was confronted with the issue of whether evidence sufficient to raise an employer's good faith doubts about the union's majority status was enough to shift the burden to the General Counsel to show a continuing majority. The court there found that the Board erred by requiring the employer to show that in fact the union no longer enjoyed majority support even when the Board found the company was justified in doubting the union's continuing majority status. The Board had reasoned that since the company had not rebutted the presumption of majority status, the presumption itself supported a finding of union majority and obviated the need of the General Counsel to produce any evidence on the issue. The court stated:

> We find that once sufficient evidence has been presented to cast *a doubt* on the continued majority status, the burden shifts to the General Counsel 'to prove that, on the critical date, the union in fact represented a majority of the employees.' (Citations omitted). Thus, evidence sufficient to justify the company's withdrawal of bargaining is sufficient to shift the burden of proof to the General Counsel. At page 270 (emphasis added).

The court found that the employer had raised a doubt of the union's majority status through evidence of the filing of a decertification petition by employees, and expressions of dissatisfaction with the union by numerous employees. The court accordingly remanded the case to the Board in order for the General Counsel to prove that the union did in fact represent a majority of employees at the time the employer withdrew recognition of the union.

> Since we have found the burden has shifted to the General Counsel and since no evidence was introduced by the General Counsel as to the union's majority status, we cannot find that it was shown that the union represented a majority of employees. . . . [T]he burden will be on the General Counsel to show the union's majority.

In *Lodges 1746 & 743, IAM v. N.L.R.B.*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied* 396 U.S. 1058 (1970) the D.C. Court of Appeals took the position that the employer may overcome the presumption of majority support upon a showing of sufficient evidence to cast a reasonable doubt on the union's continued majority status whereupon the burden shifts to the General Counsel to prove that the union in fact represented a majority of employees. In that case the court found that the Board was not warranted in finding that the employer violated §8(a)(5) of the Act when it withdrew recognition from the union since the company had a reasonably based good faith doubt of the union's majority status.

In *Lodges 1746, supra*, the employer successfully rebutted the presumption by pointing to a sharp decline in the percentage of employees authorizing checkoffs and an admission from the union's attorney that the union did not represent a majority of employees. Although the court noted that this evidence was not tantamount to a showing that the union did in fact represent a majority of employees, the company might well have entertained a reasonably based doubt as to its majority status. Accordingly, as the Board had failed to show the majority status of the union, the court refused to enforce the order of the Board.

The Eighth Circuit in *Nat. Car Rental System v. N.L.R.B.*, 594 F.2d 1203 (8th Cir. 1979) applied the serious doubts test to the issue of whether the employer had a good faith

doubt of the union's majority status. There, the court noted that the Board presented no evidence on the issue of majority status, but instead relied solely on the presumption. The court found that the employer had raised a serious doubt of the lack of majority support through evidence that the employer permanently replaced all employees during an economic strike and that the new employees had not joined or shown an interest in union representation.

Finally, the Third Circuit has also adopted the "serious doubt" test in *N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3rd Cir. 1970).

In contrast to those Circuit's adopting the clear, cogent and convincing standard, the Third, Sixth, Eighth and D.C. Circuits merely require an employer to produce evidence sufficient to raise serious doubts of the union's majority support whereupon the burden of proving majority shifts to the General Counsel.

C. The Seventh Circuit in One Case Adopted the Serious Doubts Test and in Another Case, Adhered to the Clear, Cogent and Convincing Evidence Test.

The confusion existing in the area of the law is so pronounced that there exists a split of authority within a circuit court of appeals. In *N.L.R.B. v. John S. Swift Co.*, 302 F.2d 342 (7th Cir. 1962) the Seventh Circuit appeared to apply the Board's *Stoner* test, which holds that a respondent need only produce sufficient evidence to cast serious doubt on the union's majority. The court there also makes citation to this Court's decision in *Brooks v. N.L.R.B.*, *supra*, wherein it was held that an employer must refuse to bargain with a union if it has "fair doubts" about the union's continuing majority status. In *Orion Corporation v. N.L.R.B.*, 515 F.2d 81 (7th Cir. 1975) the Seventh Circuit, without overruling or discussing its previous decision in *John S.*

Swift Co., supra, imposed the clear, cogent and convincing evidence test to rebut the presumption of continued majority support.

D. The NLRB Has Vacillated on the Quantum of Evidence It Would Require.

That such uncertainty exists in this area of the law is due in part to the previous decisions of the Board. The Board has vacillated on the quantum of evidence needed to rebut the presumption of majority support In *Stoner Rubber Co., Inc.,* 123 NLRB 1440 (1959) the Board found that the General Counsel had the burden of proving the union's majority status once the employer had raised "serious doubts."[6] In later cases, however, the Board abandoned that test in favor of a more stringent "reasonable basis" test, *Terrell Machine Co.,* 173 NLRB 1480 (1969) and *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n.,* 213 NLRB 651 (1974), member Kennedy dissenting.

The two views have been recognized by the Court of Appeals, Sixth Circuit, in *Automated Business Systems v. N.L.R.B., supra,* at footnote seven:

> The Board has characterized the *Stoner* holding as a minority rationale since only two members concurred in the quoted language . . . . The Board ruled that the correct rule was still that adopted in *Celanese Corporation of America,* 95 NLRB 664 (1951). In *Celanese,* the Board applied a good faith doubt test in determining whether an employer was justified in refusing to bargain with the union. The Board held that a good faith doubt of the union's majority was a complete defense to §8(a)(5) unfair labor practice charges,

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[6]Petitioner does not argue that the serious doubt test meets the standard set out by this court in *Burdine, supra,* of Rule 301.

> regardless of the actual majority status of the union. While the Board indicated that some basis in fact must exist to support the employer's doubt, the test was largely subjective. In *Stoner*, emphasis was placed on the production of evidence to cast a serious doubt on the union's majority status. This test is substantially an objective test. Since the test is objective and governed by the evidence produced by the employer rather than the employer's intent, there appears to be no reason for adopting a different test . . . . We find the *Stoner* rationale to be persuasive and to be the better rule and the one adopted by the courts. (Citations omitted.) The General Counsel is in a much better position to prove the majority status of the union than is the employer.

497 F.2d at 271 n.7.

Although the *Stoner* test has been adopted by the Third, Sixth, Eighth, and District of Columbia Circuits, the Board has repeatedly rejected further adherence to it, *e.g.*, *United Supermarkets, Inc.*, 214 NLRB 958, 959, n. 10 (1974) and *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n.*, *supra*, at n.21. Significantly, the Board has never adopted the clear, cogent, and convincing standard of the Second, Fifth, and Ninth Circuits.

The Board's decision and Ninth Circuit's order in this case certainly does not mitigate the confusion and uncertainty that has been engendered in this area of the law. The ALJ, while paying lip service to current Board precedent, found that Petitioner had the burden to show that the union no longer had majority status. The Board subsequently adopted the decision and order of the ALJ with little comment. However, under the current Board test, a respondent need only produce "competent evidence," or "sufficient evidence" to maintain a good faith doubt of the union's lack of majority status, whereupon the presumption disap-

pears and the General Counsel must produce *evidence* of the union's majority support, *Terrell Machine Co., supra.* In the decision below, however, the Board did not discuss or overrule any of its decisions stating its current opposition, but apparently did approve the ALJ's unique approach of shifting to Petitioner the burden of proof on the issue of the union's majority.

The opinion of the Three Judge Panel for the Ninth Circuit below adds uncertainty to an area of the law already muddied by the divergent views of the circuits as well as the apparent refusal on the part of the Board to consistently apply its own precedent. The Ninth Circuit Panel below erroneously equated its clear, cogent, and convincing standard with the analysis of *Burdine* which maintains that a presumption under Rule 301 is rebutted through the introduction of evidence sufficient to raise a genuine issue of facts.

III.

NATIONAL LABOR POLICY REQUIRES A STANDARD WHICH PUTS TO REST THE CONFLICT IN THE BOARD AND THE CIRCUITS AND WHICH PLACES THE BURDEN ON THE KNOWLEDGEABLE PARTY TO PROVE MAJORITY STATUS.

The obligation of employers to recognize and bargain with unions representing a majority of their employees in an appropriate unit is fundamental to national labor policy. Pursuant to that policy the Board has formulated an evidentiary presumption of a union's continued majority support by employees. A respondent in an unfair labor practice hearing may rebut that presumption through a good faith reasonable doubt of lack of majority support by employees.

As the situation now exists, however, what constitutes a good faith doubt depends exclusively upon which forum the evidence in support of the doubt is presented. The Second, Fifth, and Ninth Circuits would impose the exacting

clear, cogent and convincing standard. The Third, Sixth, Eighth, and District of Columbia Circuits would uphold a respondent's assertion of a reasonable good faith doubt through introduction of evidence sufficient to cast a serious doubt on the union's majority status. What standard the Seventh Circuit would impose would depend upon which three-Judge panel was appointed to hear the case.

There is here is a real and substantial conflict of law which only this Court can resolve. This Court has said that one of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on matters of federal law before the courts of appeals. *Avco Corp. v. Aero Lodge 735, I.A. of M. & A.W.*, 390 U.S. 557, 559 (1968) and *Northeastern PA Nat. B. & T. Co. v. United States*, 387 U.S. 213, 217 (1967). We have here an irreconcilable conflict. The need for uniform treatment of the same question of federal labor law is generated by the conflicting standards of review of which none is conducive to stable industrial relations nor to protection of employees' free choice of a bargaining representative.

Furthermore, the standard set out by this court in *Burdine, supra*, would place the burden on the party with greater access to the relevant evidence. To force a respondent, as the Board and courts have done, to establish that the union in fact did not represent a majority of employees is an impossible task. As the Board stated in *Stoner Rubber Co., Inc.*, 123 NLRB 1440, 1445 (1959),

> [a]n employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probable be unlawful as well as of dubious validity.

Fairness does not require that the burden of proof be shifted to the employer to prove lack of majority. To the

contrary, insofar as evidence regarding majority status or the lack thereof is peculiarly within the control of the union, fairness would require that the union, through the General Counsel, bear the burden of proof on the issue of majority status.

Furthermore, where, as here, there are facts and circumstances indicating a lack of union support by a majority of the employees, the presumption as construed by the Board and courts runs counter to the policies of the Act by foisting upon employees an unwanted bargaining representative. Moreover, it is well settled that the employer has an obligation to bargain only with a majority union. In fact, an employer places itself in jeopardy of committing an unfair labor practice by executing a contract with a union where there is evidence that a majority status of the union is open to serious question, *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731 (1961) and *Anderson Pharmacy*, 187 NLRB 301 (1970). These cases are premised on the statutory policy as embodied in Section 7 of the Act to give full freedom to employee choice as to a bargaining representative. By requiring the employer to prove that, in fact, the union represented a majority of employees, the Board and courts not only give too great a force to a rebuttable presumption but place the employer between the proverbial rock of committing an unfair labor practice when he attempts by polling his employees to ascertain their desire for further union representation and the hard place of foisting an unwanted union onto employees. Because the manner in which the Board and courts have allowed the presumption to operate, the Petitioner should be required in accordance with Rule 301 to articulate some legitimate reason to rebut the presumption of continuing majority status.

CONCLUSION.

The petition for a writ of certiorari should be either granted or the case summarily remanded for a decision consistent with *Burdine, supra*.

Dated: April 14, 1982.

Respectfully submitted,

LEE T. PATERSON of
RICHARDS, WATSON, DREYFUSS
& GERSHON,
A Professional Corporation,
By LEE T. PATERSON,
Attorneys for Petitioner.

Appendix

APPENDIX A.

Memorandum.

In the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. International Medication Systems, Ltd., Respondent, No. 81-7117.

Filed Dec. 14, 1981.

Application for Enforcement of an Order
of the National Labor Relations Board
Argued and submitted November 3, 1981

Before: WRIGHT, ANDERSON, and SCHROEDER, Circuit Judges.

After a little more than a year of less than model negotiations following the Union's certification, International Medication Systems, Ltd. (IMS) withdrew recognition of, and refused to bargain further with, the Union.[1] The Administrative Law Judge found IMS's actions violative of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). The National Labor Relations Board (Board) affirmed with minor modifications. We grant the Board's application for enforcement of its remedial order.

IMS challenges the allocation of evidentiary burdens imposed by the ALJ and affirmed by the Board. In this case, as is generally done, the General Counsel invoked the presumption of the Union's majority support. The rebuttable presumption, coupled with IMS's withdrawal of recognition, established a prima facie case of unlawful refusal to

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[1]California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

bargain. *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 998 (9th Cir. 1981). IMS then had the burden of producing "sufficient evidence to demonstrate that the [U]nion was actually in the minority *or* that the employer had a good faith reasonable doubt of the [U]nion's majority support at the time of the refusal to bargain." (emphasis added). *NLRB v. Silver Spur Casino*, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, ... U.S. .... (1981).

Contrary to IMS's arguments, this procedure does not impermissibly shift the burden of proof to the employer. As we have recently stated, "In an unfair labor practice proceeding before the Board the burden is upon the General Counsel to establish by a preponderance of evidence that an unfair labor practice has occurred." *Id.* The presumption of majority status does not shift the burden of proof in the sense of the risk of non-persuasion, but merely shifts to the employer a burden to produce sufficient evidence to meet or rebut the presumption. *See* Rule 301, Fed. R. Evid. If the presumption is rebutted, then the General Counsel must prove the Union's majority status. *Silver Spur Casino, supra*, 623 F.2d at 577. The employer is not required to prove the Union's loss of majority support.

IMS contends, nevertheless, that this allocation of evidentiary burdens cannot stand in light of the Supreme Court's decision in *Texas Dept. of Community Affairs v. Burdine*, ... U.S. ..., 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In *Burdine*, the Court held that the "presumption" of unlawful discriminatory treatment, arising from the establishment of a prima facie case by the plaintiff in a Title VII action, shifted to the defendant only a burden of producing evidence that the action was taken for a legitimate, nondiscriminatory reason. 67 L.Ed.2d at 216. In describing that burden of production, the Court stated that, "It is sufficient if the defendant's evidence raises a genuine issue of

fact as to whether it discriminated against the plaintiff . . . The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id.* We assume, but expressly do not decide, that the analysis of *Burdine* is similarly applicable to the Board's proceedings in refusal to bargain cases involving the presumption of majority support.[2] We conclude, however, that our prior decisions, and our decision here, are entirely consistent with *Burdine*.

Having rejected IMS's attacks on the applicable legal standard, we have no difficulty in concurring with the Board's decision. IMS's evidence failed to raise a good faith reasonable doubt of the Union's majority support at the time of the refusal to bargain. Consequently, the General Counsel's burden of proving the unfair labor practice was carried by the unrebutted presumption. *Silver Spur Casino, supra*, 623 F.2d at 577. The Board's order is ENFORCED.

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[2]We do recognize, however, that under the Act, the Board is not absolutely bound to apply the Federal Rules of Evidence. *NLRB v. Maywood Do-Nut Co., Inc.*, 659 F.2d 108, 110 (9th Cir. 1981).

APPENDIX B.

Decision and Order.

United States of America Before the National Labor Relations Board, 253 NLRB No. 120.

International Medication Systems, Ltd. and California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Case 21—CA—18518.

On August 14, 1980, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the

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[1]The Administrative Law Judge found that the Union's failure to present Respondent's final offer to the unit employees was not evidence supportive of Respondent's asserted good-faith doubt of the Union's majority status. We agree. However, we do not rely, as it appears the Administrative Law Judge did, on the fact that the final offer was not reduced to writing. Rather, we note that any inference which we might draw from the mere failure to present the offer to the employees would require us to engage in an exercise in pure speculation.

The Administrative Law Judge found that "[n]o RM petition was ever filed by the employees." The record indicates that no RM petition was filed by Respondent and that no RD petition was filed by the employees.

[2]The Administrative Law Judge concluded that the parties were not at impasse as of October 16, 1979. Contrary to the Administrative Law Judge, we find it unnecessary to reach this issue. We have long held that while an impasse may suspend bargaining for a time, it "does not relieve an employer from the continuing duty to take no action . . . which amounts to a withdrawal of recognition of the Union's representative status. . . ." *Central Metallic Casket Co.*, 91 NLRB 572, 574 (1950). Thus, whether the parties arrived at an impasse is irrelevant to an evaluation of Respondent's asserted good faith and reasonably grounded doubt of the Union's majority status.

Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Medication Systems, Ltd., South El Monte, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. December 18, 1980.

John H. Fanning,
Chairman

John A. Penello,
Member

Don A. Zimmerman,
Member

National Labor Relations Board.

(SEAL)

DECISION.

United States of America Before the National Labor Relations Board Division of Judges Branch Office San Francisco, California, Case No. 21-CA-18518.

International Medication Systems, Ltd. and California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Lucy Acevedo, of Los Angeles, Calif., for General Counsel.

Paterson & Taggert, by *Lee T. Paterson*, of Palos Verdes, Calif., and *Wills, Green & Meuth*, by *Joseph E. Meuth*, of Los Angeles, Calif., for Respondent.

Statement of the Case.

RUSSELL L. STEVENS, Administrative Law Judge: This case was tried in Los Angeles, California on May 29 and 30, 1980.[1] The complaint, issued January 31, 1980 is based upon a charge filed December 21 by California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). The complaint alleges that International Medication Systems, Ltd. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondent.

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[1]All dates hereinafter are within 1979, unless stated to be otherwise.

Upon the record of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

At all times material herein Respondent, a Delaware corporation, has been engaged in the manufacture of pharmaceuticals, and has operated a facility located in South El Monte, California. In the normal course and conduct of its business operations, Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Background[2]

Following an election on July 6, 1978, the Union was certified on September 7, 1978 as the exclusive collective-bargaining representative of Respondent's employees in the following unit:

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[2]This background summary is based upon credited testimony and evidence that is not in dispute.

> All production employees in buildings 1, 3, 4, 6, and 7 and shipping and receiving employees; excluding all sales, purchasing, laboratory and quality assurance employees, toolmakers, maintenance mechanics, engineer and office clerical employees, professional employees, guards and supervisors as defined in the Act.

Dick Sierra[3] of the Union organized Respondent's employees, and was the Union's business representative at that time. Sierra left the Union soon after the organization, and was succeeded early in March by Alex Escoboza, who held some preliminary discussion with Respondent's representatives, as did the Union's Russ Thomas. Soon thereafter, Arlene Mordasini became the Union's business agent in charge of negotiations with Respondent.

The first contract negotiation session was held by Respondent and the Union on March 30. Mordasini represented the Union, and Norman Jones,[4] a labor consultant, represented Respondent. Also in attendance were Frances Lavendera, who then was one of Respondent's employees and a member of the Union's negotiating team, but who later was discharged by Respondent, and two other employees who also were on the Union's negotiating team. The Union's proposal, which had been given to Jones by Mordasini's predecessor, was reviewed by the parties.[5] Some of the Union's proposals were agreed to by Jones, and some were put "on hold," for later discussion. The parties agreed to put on hold, most economic items. However, Jones indicated that employees soon would be receiving merit increases, and

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[3]Employees are referred to herein by their last names.

[4]Counsel stipulated that Jones was an agent of Respondent within the meaning of the Act, at all times relevant herein.

[5]The proposal, with Jones' notes thereon, is General Counsel's Exhibit No. 3, and Respondent's Exhibit No. 2. Mordasini denied ever seeing General Counsel's Exhibit 3 prior to trial.

that, further, the minimum wage soon would be increased. In order not to interfere with, or delay, those increases, the parties executed a brief agreement to their institution.[6] Mordasini requested from Jones, information concerning all of Respondent's wages and benefits for employees. Jones gave her a copy of a pamphlet describing Respondent's insurance, health and welfare benefits, and at a later meeting, gave Mordasini Respondent's wage structure and a list of benefits. Jones asked Mordasini about the trust fund, and since she did not know the answers to the questions Jones asked, she said she would ask a trust fund representative to attend the next meeting.[7]

The second meeting was held April 16, with the same five people in attendance. Also present was McCusker, who attended because of Jones' request to Mordasini on March 30, for information relative to the trust fund. The parties discussed some of the Union's proposals, and, with McCusker, discussed the trust fund. Jones gave Mordasini a list of vacation and other benefits effective as of April 10, 1979, as a part of the information Mordasini had requested at the meeting of March 30.[8]

The third meeting was held April 24. Mordasini, Jones and Lavendera were present, but the two other employee negotiating committee members were not there. Jones called Respondent's office, and learned that the employees did not have transportation. It was agreed that Respondent would provide transportation, and the two employees appeared soon thereafter. Jones gave to Mordasini Respondent's pay

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[6]General Counsel's Exhibit No. 4.

[7]Mordasini testified that the trust fund representative, a Mr. McCusker, was present at the March 30 meeting. However, Mordasini appeared to be a confused witness, with an unreliable memory. Jones' testimony on this point is credited.

[8]Respondent's Exhibit No. 4.

schedule and classifications that Mordasini had requested March 30, and also gave Mordasini a copy of Respondent's proposals for contract negotiation.[9] Jones also gave Mordasini a copy of Respondent's insurance booklet.[10]

The fourth meeting was held May 11.[11] Jones, Mordasini, and Lavendera were in attendance. Mordasini told Jones at the meeting, that she had forgotten to inform the two other employee committee members of the meeting.[12] After discussing proposals, Jones and Mordasini agreed to meet May 30. That date later was noticed to be a holiday, and the two agreed on June 21 for the next meeting. On June 4, Jones sent to Mordasini a copy of Respondent's work rules, in accordance with Mordasini's request.

The fifth meeting was held on June 21. In attendance were Jones and Mordasini. Mordasini informed Jones that Lavendera[13] had secured a part-time job, and further stated that the two employee committee members had been notified of the meeting. Jones called Respondent on the telephone, and was advised that the two had told their foreman that they were not interested in coming to any more meetings. Jones reported that fact to Mordasini, who did not reply. Jones and Mordasini then discussed proposals and counter-

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[9]Respondent's Exhibit No. 1.

[10]General Counsel's Exhibit No. 6.

[11]Mordasini testified that the parties agreed April 24 to meet May 1, and that she and Lavendera appeared May 1 and waited 40 or 45 minutes, but that Jones did not appear. Jones denied that a meeting was scheduled for May 1. As noted *supra*, Mordasini's memory seemed poor, and she appeared confused and uncertain throughout her testimony. She acknowledged that she had difficulty remembering dates of events. Jones' version on this point is credited, as is his recitation of events at the May 11 meeting.

[12]Lavendera was discharged by Respondent soon after the meeting of May 11, and did not thereafter attend any meetings with Jones and Mordasini.

[13]Lavendera by then had been discharged by Respondent.

proposals, and Respondent's work rules.[14] Jones gave to Mordasini, Respondent's then-current wage scale.[15] The next meeting was scheduled for July 12, but Jones was unable to attend because of delay of an airplane he was on, in Denver or Salt Lake City. Jones called Mordasini on the telephone, but she was not in,[16] and Jones advised Mordasini's secretary that he could meet with Mordasini on July 13. Jones went to Mordasini's office July 13, but Mordasini was not in. An arrangement later was made to meet on July 20.

The sixth meeting was held July 20, with only Jones and Mordasini in attendance. Non-economic items were discussed, and there was agreement on some of them. Mordasini gave Jones the Union's economic proposals,[17] which was the first instance of such presentation because the parties agreed early in negotiations to defer economic matters. Prior to this date, Mordasini had received Respondent's existing wage structure. Jones said he would present the Union's economic proposals to Respondent. The parties discussed a union security provision, as they had in earlier meetings, but were unable to reach agreement.

A meeting was scheduled for August 3, but Mordasini's secretary called on the telephone to advise that Mordasini was going to be late, and Jones replied that his schedule

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[14]Mordasini's testimony that Lavendera and, she "believed," an employee committee member (she later said she was sure), attended the meeting, was confused and uncertain, and is given no credence.

[15]General Counsel's Exhibit No. 17.

[16]Mordasini testified that she is out of her office much of the time, and spends approximately 20 or 25 hours each week in her office. When she is out, she relies upon a secretarial staff to take telephone calls and assist in scheduling meetings.

[17]General Counsel's Exhibit No. 7. These proposals originally were prepared for presentation at the July 12 meeting, which was cancelled.

precluded a later meeting. The parties did not meet August 3.[18]

The next meeting was scheduled for Septebmer 6, but was not held. Jones testified that his great uncle became gravely ill and died just prior to the scheduled date, and he went to Massachusetts on an emergency trip. Jones said he and his great uncle were in business together, and that he was his executor of the estate. Jones said he was in Massachusetts only 2 days, made one unsuccessful telephone call to the Union on September 6, and the next day was successful in reaching someone in the Union office. He said he asked that person to advise Mordasini about the problem. Mordasini later, on September 20, wrote to Jones, as follows:

> Dear Mr. Jones,
>
> I have tried several times to reach you regarding International Medication Systems limited Contract negotiations.
>
> I had confirmed by letter to you a meeting on Thursday, September 6, 1979 at 1:00 p.m. in our office. Neither you or anyone from the Company was present for that meeting. It was not cancelled by you or the Company.
>
> My question is, do you intend to resume negotiations and if you do, please contact me as soon as possible regarding dates. Or, is it the Company's position not to negotiate at all?
>
> Please advise me of your intentions regarding this matter as soon as possible.

The eighth meeting was held September 24, with Jones and Mordasini in attendance.[19] Mordasini gave to Jones, a

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[18]Mordasini testified that she believed Jones cancelled this meeting because of a delay he experienced in Russia, but the Russia matter, discussed *infra*, did not arise until late September.

[19]Mordasini testified that she did not see Jones after September 6, but that testimony is not credited. The lack of credit is due to Mordasini's poor memory; her veracity is not in question.

typed version of the contract language the two had agreed to as of that date.[20]

On October 2 Jones left a message with Mordasini's secretary, stating that he could meet with her October 9 or 10. By letter dated October 2, Mordasini confirmed the meeting date of October 10. Jones did not arrive for the meeting, and Mordasini testified that she never was told why. She said she tried several times, without success, to reach Jones by telephone. Jones testified that he left for Russia September 25 or 26, and that his return was delayed until October 11. He said he telephoned his brother from Russia, and asked him to call Mordasini on the telephone and explain the delay. This discrepancy is given no weight, since it is possible that both Jones and Mordasini gave accurate testimony.

Jones testified that he and Mordasini met on October 16 and discussed the proposals Mordasini had submitted in September, but Mordasini denied that there was a meeting October 16. Jones testified that Mordasini appeared very upset during the meeting, because of her sister's illness. Her sister died shortly thereafter, on October 29. Mordasini's testimony relative to this subject was particularly confused. Initially, she stated on cross-examination that there were no meetings in October, then she testified that Jones talked with her about meeting in October, but that she did not remember meeting in that month. Finally, she testified that it is "possible" that she and Jones met in October for approximately 30 minutes, and that, at that time, Jones had not yet been able to talk with Respondent about money issues. Mordasini's pre-trial affidavit, which shows changes made by a National Labor Relations Board agent at Mor-

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[20]Respondent's Exhibit No.5.

dasini's request, was as confusing as her testimony, and her attempt to explain the confusion was not reliable. Jones testified that he and Mordasini discussed many subjects on October 16, and that he gave Mordasini at that time, Respondent's final proposal, on economic as well as non-economic items. Mordasini denied that Jones ever gave her a counterproposal to the Union's economic proposals, and denied that she ever received a final offer from Jones. Jones testified that he made notes of the October 16 meeting, on a letterhead from her obtained in the union office where they met. Those notes, and testimony relative thereto, state:[21]

> THE WITNESS: On Line 1, it says, "A and J present." That means Arlene and Jones. October 16th is the date and 2:15 p.m. is the time.
>
> JUDGE STEVENS: Well, just read it. We can see that.
>
> THE WITNESS: Okay. "Very upset and seemed way out; never like this before." That refers to when I talked to her that she was quite upset.
>
> BY MR. PATERSON:
>
> Q. Mr. Jones, I'm going to ask you to just read it first, and then we'll come back.
>
> A. Okay. "Discussed proposals on economics. Union still wanted Union shop and/or maintenance and membership." "Also Union offer 50 cents."
>
> JUDGE STEVENS: Is that also a check-off?
>
> THE WITNESS: Check-off, yes. Also check-off. "Fifty cents offer on health and welfare. Want to check with Company president," so that's when I went and made a phone call.
>
> BY MR. PATERSON:

---

[21]Respondent's Exhibit No. 7. This exhibit is on union letterhead paper.

Q. On Line 6 at the far right side, what are the little words over there?

JUDGE STEVENS: It's something about pension; isn't it?

THE WITNESS: It looks like plus pension, "p-e-n."

BY MR. PATERSON:

Q. Line 7.

A. "She went out to talk to someone." Eight, "new offer, 25 cents, Union shop and wants — or maintenance and membership and other Union plans. I said 'no'."

MS. ACEVEDO: Excuse me, Your Honor. Could he read it directly as it is written on here? I don't want his explanations.

JUDGE STEVENS: All right. Just read it, please.

THE WITNESS: Okay. It says "no," and there's something that's crossed out, whatever it is. "She said counter offer 25 cents, maintenance and membership. Agree to all Company language and drop request for Union health and welfare pension. Call Company and talk to Bob and controller, as president not in. Told only to go to federal minimum and all new hires, et cetera, but keep the spread example. Everyone go up same as legal minimum to keep spread. Told final offer of Company and get back with Union answer with employees' vote."

JUDGE STEVENS: What's that last one? Told what?

THE WITNESS: "Told final offer of Company and get back with Union answer with employees' vote."

It is found that Jones and Mordasini met October 16, and that the foregoing meeting notes then were made by Jones. Jones' version of the meeting is credited.

On November 8, Jones wrote a letter to Mordasini, reading as follows:[22]

> Dear Mrs. Mordasini:
>
> This is in regard to the above subject matter and our several meetings over the past months.
>
> After our fifth meeting, wherein the company employees on your bargaining committee refused to attend the meetings, it appeared that the employees at the plant had no further interest in the Union to continue to represent them.
>
> However, the parties continued to meet off and on, but no agreement was ever reached.
>
> The union rejected the company's final offer, twice, because they felt the union needed more security plus the economic items as offered to the union were not acceptable and a legal impass was reached between the parties.
>
> With the turn over of employees, the lack of employee interest in the union, and/or the parties unable to reach agreement, it is very apparant that the union does not in fact represent the majority of the employees in the bargaining unit.
>
> Therefore, we would suggest you show proof of the union's continued interest by use of the N.L.R.B. if you wish to represent the employees at the company.
>
> Very truly yours,
>
> Norman Jones

Mordasini attempted on several occasions to reach Jones by telephone in December, but was not successful. On those occasions she left messages on Jone's answering recorder. On December 3, Mordasini wrote to Jones as follows:

---

[22]Mordasini denied receiving this letter until March 3, when she received a copy of it attached to Jones' March 3 letter. That testimony is not credited.

Dear Mr. Jones:

As per the message I left on your answering machine on Friday, I would like to follow up with this written request.

I would like to schedule a meeting with you for IMS negotiations as soon as possible. Dates which I am available are December 13, 14, 17, 19, 20 and 21. Please let me know which of these dates you can confirm for a meeting.

Thanking you for a speedy reply,

Jones called Mordasini on the telephone and they agreed to meet on January 3, 1980. That meeting was not held, and Jones testified that the reason was his being snowbound in Denver. Jones said he called his brother on the telephone and asked him to cancel the meeting with Mordasini.

On February 7, 1980 Mordasini wrote to Jones, as follows:

Dear Mr. Jones

Since it is impossible to reach by phone other than your phone recording, I respectfully request that we schedule mutually agreeable times and dates for the purpose of collective bargaining.

I feel that with some effort, the contract negotiations between IMS and Teamsters Local 911 could be concluded.

For your convenience, I submit the following dates for negotiations:

February 13, 1980 at 1 P.M., all afternoon
February 15, 1980 at 10:00 A.M., or at 1 P.M.
February 21, 1980 at 1 P.M.
February 22, 1980, all day availability

Please confirm any or all of the above dates that are available for you to meet with me.

On March 3, 1980 Jones replied to Mordasini as follows:

Dear Mr. Mordasini:

This is in answer to your letter of February 7, 1980, on the above subject matter.

As indicated in our letter of November 8, 1979, we are of the belief that the Union does not represent a majority of the employees in the Unit at the Company.

Therefore, the Company has no desire to meet with the Union until the Union can show proper proof by way of an N.L.R.B. Election that they represent a majority of the employees.

Contentions of the Parties

General Counsel contends that Respondent violated Section 8(a)(5) of the Act by failing and refusing to meet with the Union for the purpose of collective bargaining, and by withdrawing its recognition of the Union.

Respondent denies that it failed and refused to meet and bargain, and contends that it had reasonable, objective reason to withdraw recognition of the Union.

A. Alleged Dilatory Tactics by Respondent

General Counsel argues that Respondent intentionally frustrated bargaining, by engaging in dilatory tactics such as delaying and cancelling meetings.

Several facts are not in dispute, or clearly are established by the record. First, Jones, who was Respondent's sole negotiator, was not argumentative or demeaning, or difficult to deal with. Mordasini states that she considered Jones "... a very professional person and very easy to talk to." Second, the complaint alleges no unfair labor practice prior to June 21, and bargaining until at least that date followed a normal course, free of any noteworthy problems. Third, both Jones and Mordasini were away from their offices approximately 50 percent of the time, and in Jones' case, probably more. During absences, Jones depended upon a

recording device to accept telephone calls, and Mordasini depended upon a clerical staff. Fourth, Mordasini's credibility as a witness seriously was impaired by her poor memory. Fifth, Jones gave to Mordasini, all the information she requested for her assistance in negotiation.

The meeting scheduled for July 12 was not held, because of Jones' unexpected absence from the state. Jones credibly testified, and Mordasini did not deny, that Jones telephoned Mordasini's office, and later, on July 13, went to her office to arrange a meeting. The two negotiators met on July 20, which was a delay of 8 days. It is clear from such circumstances that Jones did not intentionally delay the meeting scheduled for July 12, and that he was reasonably diligent in arranging a substitute date.

Jones' credited testimony, not denied or challenged by Mordasini, makes it clear that the meeting scheduled for August 3 was not missed because of Jones' fault, or because of intentional delay by Jones. Mordasini was delayed, and Jones was unable to meet later than the scheduled time. The next meeting was held a week later.

A death in Jones' family precluded his meeting as scheduled on September 6, and there is no indication that Jones used that circumstance as an excuse not to meet Mordasini on September 6. Jones was absent from the state only 2 days, and made an effort during that absence, to get in touch with Mordasini. Mordasini wrote a letter to Jones, dated September 20, and they met 4 days later, on September 24.

It is clear from Jones' credited testimony, that his failure to meet as scheduled on October 10 was not a delaying tactic. He was delayed in Russia, and made an attempt to get in touch with Mordasini. The next meeting, 6 days later on October 16, is in dispute, as discussed herein.

Discussion

Mordasini credibly testified that she experienced much difficulty in getting in touch with Jones. She implied in her testimony that Jones gave her the runaround, and dodged her efforts to meet and negotiate. She further testified that she went to Respondent's office sometime during the summer and inquired about scheduling meetings, but that she was referred back to Jones. However, Jones testified that Mordasini also was difficult to reach by telephone, and he denied (indirectly, by his testimony) that he was guilty of intentional delaying tactics.

It is clear that both Jones and Mordasini were somewhat less than diligent in their attempts to negotiate. Both were out of their offices as much, or almost as much, as they were in. Jones was preoccupied with other interests and, usually, only sprang to life, so far as negotiations are concerned, when he was goaded by Mordasini. On the other hand, Mordasini was "soft sell" throughout the negotiations, and was not as aggressive as would be expected. She did not inquire when Jones missed meetings, as to the reasons therefor. She contends that Jones was dilatory, yet she testified that he was easy to work with, and that he was a capable "professional." Her poor memory, and uncertainty, surely exacerbated the problem created by Jones' frequent jaunts out of state. Under such circumstances, it would be unjust to lay the cause for delayed negotiations solely at Jones' feet. It is found that, as of October 16, Jones had not delayed negotiations as alleged in the complaint.

The question then arises, as to whether or not Jones and Mordasini met on October 16. Jones testified in a firm and convincing manner that they did meet. He testified in detail, relative to their discussion of many matters at that meeting. Mordasini did not deny those disucssions, and confirmed

a discussion concerning the necessity for the employees to ratify any proposed contract. Jones fixed the date of the discussions as October 16, and Mordasini did not fix any other date for them. The sequence of events supports Jones' testimony; his contention of impasse, and of the Union's loss of employee support, closely followed, on November 8, the meeting of October 16. Finally, Jones' testimony concerning his notes of the meeting, made during the meeting and on the Union's stationery, was pursuasive. Mordasini's equivocal denial of the meeting, and her uncertainty, strongly militate against a conclusion that no meeting was held on October 16. Clearly, the meeting was held.

B. The Impasse Question

Prior to October 16, the parties were not at impasse. They had agreed to most noneconomic items, but nearly all economic items still were in dispute. Mordasini contends that Jones never presented any economic proposals, but that contention is not credited, as discussed above. As of October 16 the parties still were meeting and negotiating. Jones contends that events of October 16, and thereafter, show that an impasse was reached October 16, since he then made a final offer to Mordasini which was refused. Concerning the final offer, Jones testified:

> . . . And, at that time, I had the — she wanted to know how we could finalize everything. And so I gave her a complete package. I told her — she wanted X number of cents per hour in the Union shop and the check-off. And I said no, that we wouldn't do that. We'd give them X number of cents. And so she then went into the office. I think the secretary-treasurer of the Local was there or somebody. I think I saw him that day. And she was called to the phone — one time go out of the room, or maybe twice; once I remembered. She talked about that she had the authority to make a deal

and I said, "Well, according to my understanding, you have to take it back to the members involved." So then I went out and made a phone call to the president of the Company because she had given me a proposal on economics. She was willing to drop some of her demands. And then we talked a little bit more and then I went and made another phone call to the president. I think his son-in-law was also on the phone, a three-way conversation. So they said that, because the wage and hour was going up starting January 1st for the thing, that we would go the $3.15, which we are required by law, and we would also go the same amount to all the other people in the classifications to keep the spread the same. That was my proposal to give to her economics. The last proposal that we would not agree to a Union shop or an agency shop or a maintenance and membership or a check-off. And that that was the Company's final proposal and that — then she left the room and come back a few minutes later and said, no, that she still felt that she should have at least the maintenance and membership and that she needed more money because the people were being paid starve wages or whatever, those types of things. It was left that that was our last proposal and that was it.

So then I got out — that meeting lasted about two hours, I think, two and a half hours.

Q. Did you tell her it was your final proposal?

A. Yes.

Q. Did you ask her to take it for a vote of the members?

A. I don't think I asked her to take it. I told her that I knew that Teamsters' locals had to have a vote of the membership.

The foregoing testimony by Jones is credited. General Counsel argues that the testimony should not be credited because,

among other reasons, it was customary for the parties to submit proposals in writing, and that an alleged oral proposal is unlikely. However, it is apparent that, by October 16, Mordasini was anxious to have a contract, and the parties were down to arguing only a few remaining items, all of which were of an economic nature. Jones' testimony on this point was logical, and consistent with other events. However, Jones never reduced Respondent's final offer to writing, and Mordasini's expectation of a written proposal was in accord with past practice of the parties, albeit that practice was limited, and was in accord with good business practice. An oral presentation to employees of a final offer would be fraught with the possibility of error. Mordasini and Jones understood what they said to each other, and, possibly, they may have suspected that they were at an impasse, but an impasse cannot be found under such circumstances, since only the employees could, under the Union's constitution, agree to a contract, and Mordasini reasonably could not be expected to present only an oral proposal to them. It would be an injustice to permit Respondent, under such circumstances, to have the right to any advantage it may contend could flow from an impasse. It is found that, as of October 16, the parties were not at impasse.

C. Respondent's Withdrawal of Recognition.

Jones' letter of November 8, as confirmed March 3, 1980, was Respondent's withdrawal of recognition because of Respondent's alleged belief that the Union no longer represented a majority of the unit employees.

In explaining his reasons for doubting the Union's majority status, Jones testified:

> Well, we appeared that at least there was no more meetings with the employees, no more bulletins coming out saying they were having meetings. The three people who were on the original Union committee were

> not — did not come any longer nor were there any replacements. The Union had rejected the Company's offers because they wanted the Union shop or at least a maintenance and membership and check-off, plus x number of cents per hour. There was quite a large turnover of employees in the bargaining unit. And, from all indications, it did feel like nobody was interested any further.

So, after talking with the Company about this, we decided that they didn't want to accept out (sic) last offer; that was it. And, if they didn't want it, that was fine, one way or another. So the letter was sent.

No RM petition ever was filed by employees. Mordasini credibly testified that she met with employees on three occasions, in April and prior thereto, and that, at one of the meetings, 50 to 80 of the 125 unit employees attended. She said no employee indicated a desire that the Union not represent them. Jones acknowledged that no employee ever told him that employees no longer wanted the Union to represent them. Respondent did not establish by proof, its allegation that the employees were dissatisfied with the Union. Only general conclusions were stated by Jones. It may well be, as argued by Respondent, that the members of the employees negotiating committee became disinterested in further participation in negotiations, *but that fact, alone, would* not establish general employee disinterest in being represented by the Union.[23]

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[23]*White Castle Systems Inc.*, 224 NLRB 1089, cited by Respondent, is not controlling since there, the objective evidence other than the factor of the bargaining committee make-up, was overwhelming in support of the Respondent's contentions. The Administrative Law Judge there recognized that fact, and cited the bargaining committee matter as only one that was ". . . entitled to some weight." *Burns International Security Services v. N.L.R.B.*, 567 F.2d 945, 97 LRRM 2350 (C.A. 10, 1977), denying enforcement of 225 NLRB 271, 92 LRRM 1439 (1976) is of no support for Respondent's argument, for the same reasons.

So far as an alleged high turnover of employees is concerned, such a factor does not, *per se* justify withdrawal of recognition. New employees are presumed to support the Union in the same ratio as employees they replace.[24] In any event, Respondent introduced no evidence to establish a high rate of employee turnover.

Respondent argues that the "most telling" evidence of the Union's lack of support was the fact that Mordasini did not take the Union's final offer to the membership as required by the Union's constitution. However, as discussed above, Respondent never reduced its final offer to writing. Failure to make such a presentation to employees is not evidence of lack of union support.

The Board consistently has applied the test it set forth in *Terrell Machine Company, supra*, in determining whether or not a Respondent legally is justified in withdrawing recognition from a union that has been certified as the bargaining representative of Respondent's employees. The Board stated in *Terrell*:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no

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[24]*Gregory's Inc.*, 242 NLRB No. 104; *Cutten Supermarket*, 220 NLRB 507; *Terrell Machine Company*, 173 NLRB 1480.

> longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i.e., "good-faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the union. This second point means, in effect, the assertion of doubt must be raised "in a context free of unfair labor practices."

Here, it was Respondent's burden to establish that it had doubt of the Union's majority status, based upon the fact of lack of such status, or upon objective considerations advanced in good faith. Respondent *did not meet its burden*. The fact of lack of majority support for the Union was not shown, and the objective considerations alleged as supportive of its doubt, clearly are inadequate to meet its burden. The record does not establish justification for Respondent's withdrawal of its recognition of the Union as the representative of Respondent's unit employees.

Although there was some contact between Mordasini and Jones after November 8, there was no further negotiation, and Respondent has continued its refusal to recognize and bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and the entire record, I make the following:

Conclusions of Law

1. International Medication Systems, Ltd. is, and at all times material herein has been, an employer in commerce within the meaning of Section 2(6) and (7) of the Act.

2. California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for purposes of collective bargaining for Respondent's employees:

> All production employees in buildings 1, 3, 4, 6, and 7 and shipping and receiving employees; excluding all sales, purchasing, laboratory and quality assurance employees, toolmakers, maintenance mechanics, engineer and office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The Union is, and at all times material herein has been, the exclusive bargaining representative for all employees in the unit described above.

5. Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union as the exclusive bargaining representative of Respondent's employees in the appropriate unit described above.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[25]

ORDER

Respondent, International Medication Systems, Ltd., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Violating Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All production employees in buildings 1, 3, 4, 6, and 7 and shipping and receiving employees; excluding all sales, purchasing, laboratory and quality assurance employees, toolmakers, maintenance mechanics, engineer and office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

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[25]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action, which is deemed necessary to effectuate the polices of the Act:

(a) Recognize and, upon request, bargain collectively with, California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of all employees in the appropriate unit described above, with regard to pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its South El Monte, California facility copies of the attached notice marked "Appendix."[26] Copies of the notices on forms provided by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 21, in writ-

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[26]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: AUGUST 14, 1980.

/s/ Russell L. Stevens
Russell L. Stevens
Administrative Law Judge

Notice to Employees

Posted by Order of the National Labor Relations Board, an Agency of the United States Government.

WE WILL NOT refuse to recognize or bargain with, California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of employees of International Medication Systems, Ltd. in the following appropriate bargaining unit:

> All production employees in buildings 1, 3, 4, 6 and 7 and shipping and receiving employees; excluding all sales, purchasing, laboratory and quality assurance employees, toolmakers, maintenance mechanics, engineer and office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL recognize and, upon request, bargain collectively with the aforesaid union as the exclusive bargaining representative of all employees in the above-described appropriate unit, with regard to pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

International Medication Systems Ltd.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an Official Notice and Must Not Be Defaced by Anyone.

This notice must remain posted for 60 consecutive days

from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with it provisions may be directed to the Board Office.

City National Bank Building, 24th Floor, 606 S. Olive Street, Los Angeles, CA 90014 Telephone Number: (213) 688-5229.

APPENDIX C.

Order.

In the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. International Medication System, Ltd., Respondent, No. 81-7117. Filed March 8, 1982.

Before: WRIGHT, ANDERSON and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1913

In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL MEDICATION SYSTEMS, LTD.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the Union without having a reasonably based good faith doubt as to the Union's majority support among the employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1913

INTERNATIONAL MEDICATION SYSTEMS, LTD.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. 1-3) is not officially reported. The Board's decision and order (Pet. App. 4-32) is reported at 253 N.L.R.B. 863.

JURISDICTION

The judgment of the court of appeals was filed on December 14, 1981. A petition for rehearing was denied on March 8, 1982 (Pet. App. 33). The petition for a writ of certiorari was filed on April 16,

1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a representation election, the California Teamsters Public, Professional and Medical Employees Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") was certified by the Board on September 7, 1978, as the exclusive bargaining representative for a unit composed of petitioner's production, shipping, and receiving employees (Pet. App. 7-8). Union officials met with petitioner's representative in December 1978 to discuss the forthcoming contract negotiations and to present some preliminary contract proposals. In March 1979, Arlene Mordasini became the Union's business agent and chief negotiator (*id.* at 8). In preparation for the start of formal negotiations, Mordasini distributed questionnaires to the unit employees to determine the types of contract benefits they wanted (Tr. 44).[1] In addition, a three-member employee bargaining committee was selected (Pet. App. 8),[2] and three mem-

[1] "Tr." references are to the transcript of the hearing conducted by the Administrative Law Judge ("ALJ"). "GCX" references are to the exhibits introduced by the General Counsel at the hearing.

[2] Two members of the employee bargaining committee, Obdulla Divan and Esidona Gomez, spoke little English and were dependent on the third member of the committee, Francis Lavendera, to translate the bargaining sessions into Spanish (Tr. 22, 389-390). At some point in May, the Company discharged Lavendera (Pet. App. 10 n.12). In a separate proceeding the Board found the discharge to be unlawful. *International Medication System*, 244 N.L.R.B. 861 (1979), remanded, 640 F.2d 1110 (9th Cir. 1981), cert. denied, No. 81-1175 (Mar. 22, 1982).

bership meetings were held preceding and during the early stages of the negotiations. The last of the union meetings occurred on May 1 (*id.* 24; Tr. 81-85, 125-126).

The first four formal bargaining sessions were held on March 30, April 16, April 24, and May 11, 1979 at the offices of another Teamsters local in South El Monte. Petitioner's negotiator, Norman Jones, union negotiator Mordasini, and the entire employee bargaining committee attended the first three sessions.[3] The next bargaining session was held on June 21 in South El Monte with only Mordasini and Jones present. Mordasini advised Jones that Lavendera was working elsewhere and would not be able to attend any further sessions. See note 2, *supra*. When employee bargaining committee members Obdulla Divan and Esidona Gomez failed to arrive, Jones called petitioner's offices and was informed that Divan and Gomez had told their foreman that they were no longer interested in attending the bargaining sessions (Pet. App. 10). Jones and Mordasini met again on July 20 at the Union's office in Long Beach. Jones had requested that the July 20 session be held at the Union's office in Long Beach because it was more convenient for him than South El Monte. When Mordasini expressed concern that the employee bargaining committee members would have difficulty arranging transportation to Long Beach, Jones responded that it was not necessary for the committee to attend the bargaining sessions. After confirming that it was not unusual to meet without an employee bargaining committee, Mordasini agreed to hold the

[3] Two members of the employee bargaining committee, Divan and Gomez, were absent from the fourth bargaining session on May 11 because Mordasini forgot to inform them of the session (Pet. App. 10; Tr. 218, 292).

July 20 session and subsequent sessions in Long Beach (*id.* at 11; Tr. 41-42, 222, 386).

At the July 20, 1979 session, agreement was reached on some noneconomic issues and Mordasini presented the Union's proposals on the economic issues (Pet. App. 11). A hiatus in negotiations followed. On September 20, Mordasini sent Jones a letter inquiring whether the Company intended to resume the negotiations. On September 24, Mordasini met with Jones and gave him a draft of the contract provisions which had been agreed to (*id.* at 12).

The final bargaining session was held on October 16, 1979. Jones orally presented the Company's counterproposals dealing with economic issues and the unsettled noneconomic issues. Discussions followed. Disagreements remained as to inclusion of a union security provision in the contract and the wage rate for entry level positions. At the conclusion of the session, Jones told Mordasini that the Company's proposals constituted a final offer and asked Mordasini to "get back with [the] Union['s] answer" after the employees voted on the Company's proposals (Pet. App. 13-15).

On November 8, 1979, Jones, acting for petitioner, wrote to Mordasini claiming that the Union "d[id] not in fact represent the majority of the employees in the bargaining unit" and stating that "if you wish to represent the employees at the company" the Union should prove its majority status "by use of the N.L.R.B." (Pet. App. 16). Petitioner cited three factors—employee turnover, a lack of employee interest in the Union evidenced by the absence of the employee bargaining committee from the bargaining sessions, and the inability of the parties to reach agreement on a contract—to support the suggestion that the Union

no longer represented a majority of the employees (*ibid.*). Petitioner rebuffed the Union's attempts to arrange another meeting, repeating its claim that it doubted the Union's majority status (*Id.* at 16-18).

2. Adopting the decision of an Administrative Law Judge, the Board found (Pet. App. 26) that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from the Union on November 8, 1979, and by thereafter refusing to bargain with the Union. In so finding, the Board rejected petitioner's claim that it had objective evidence supporting a reasonable good faith doubt as to the Union's continued support among a majority of the unit employees (Pet. App. 23-26).

Before the Board, petitioner cited four factors which, it claimed, supported its doubts as to the Union's majority status: (1) the absence of the employee bargaining committee from some of the bargaining sessions; (2) the Union's failure to hold employee meetings during a six month period or to replace the members of the employee bargaining committee; (3) the Union's alleged failure to take affirmative action to represent the unit employees after the Company withdrew recognition; and (4) the Union's failure to submit the Company's contract proposals to the unit employees for ratification pursuant to the Union's constitution (Pet. App. 23-24).[4]

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[4] In its November 8 letter to the Union, petitioner also cited employee turnover as a basis for its withdrawal of recognition. The ALJ found (Pet. App. 25) that petitioner's reliance on employee turnover was unjustified. Petitioner took no exception to the ALJ's finding before the Board and did not raise the issue before the court of appeals. Conversely, two of the factors that petitioner cited before the Board—

Noting that "Jones acknowledged that no employee ever told him that employees no longer wanted the Union to represent them" and the complete absence of evidence suggesting employee dissatisfaction with the Union (*id.* at 24), the Administrative Law Judge found that these factors did not meet petitioner's burden of establishing objective factors to support a reasonably grounded doubt respecting the Union's continued majority status (*id.* at 25-26).[5]

3. The court of appeals enforced the Board's order. In the court of appeals petitioner argued for the first time that the Board's use of a rebuttable "presumption" of continuing majority support for a union duly certified as bargaining representative effected a shift of the ultimate risk of nonpersuasion that is inconsistent with the provisions of Rule 301 of the Federal Rules of Evidence respecting the effect of a presumption, and with this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Acknowledging that "the Board is not absolutely bound to apply the Federal Rules of Evidence" (Pet. App. 3 n.2), the court nonetheless stated (*id.* at 2) that the burden of proof is placed upon the General Counsel to establish that an unfair labor practice—here refusal to bargain—has occurred. The court explained (*id.* at 2; citation omitted):

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the lack of union meetings, and the Union's failure to submit the Company's proposals to the unit employees—were not mentioned in the Company's November 8 letter to the Union.

[5] The Board noted that no decertification petition was filed by the unit employees and that no request for a new election to test majority support had been filed by petitioner (Pet. App. 4 n.1).

> The presumption of majority status does not shift the burden of proof in the sense of the risk of non-persuasion, but merely shifts to the employer a burden to produce sufficient evidence to meet or rebut the presumption. See Rule 301, Fed. R. Evid. * * *.

Moreover, the court of appeals assumed, without deciding, that "the analysis of *Burdine* is * * * applicable to the Board's proceedings in refusal to bargain cases involving the presumption of majority support" (Pet. App. 3). Applying Rule 301 and *Burdine*, the court of appeals nonetheless agreed with the Board's determination that petitioner's "evidence failed to raise a good faith reasonable doubt of the Union's majority support at the time of the refusal to bargain" (*id.* at 3). In these circumstances, the court held that the General Counsel had borne the burden of proving the occurrence of the unfair labor practice (*ibid.*).

ARGUMENT

Petitioner does not dispute the settled proposition that a union's majority support is presumed to continue following certification and that, absent unusual circumstances, the presumption is irrebutable for one year, and thereafter may be rebutted by a showing of actual minority status or that the employer had a good faith reasonable doubt of the Union's continued majority support at the time of the refusal to bargain.[6] Rather, petitioner contends (Pet. 6-12), in considering whether petitioner had rebutted the presumption, the court of appeals im-

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[6] See, *e.g.*, *NLRB* v. *Burns International Security Service, Inc.*, 406 U.S. 272, 279 n.3 (1972), citing with approval *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951); see *Brooks* v. *NLRB*, 348 U.S. 96, 98-99, 104 & n.18 (1954).

posed a more onerous burden upon it than is permitted by Rule 301 of the Federal Rules of Evidence and this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Petitioner also contends (Pet. 12-20) that further review is warranted in this case to resolve a conflict among the circuits as to the quantum of evidence required to overcome the presumption of majority support. Neither contention warrants review in the setting of this case.

1. Petitioner's contention that the decision below conflicts with the provisions of Rule 301 or this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, *supra*, is insubstantial.[7] As explained above, the court of appeals agreed with petitioner's contention that, in conformity with Rule 301, the ultimate burden of proof remains at all times with the General Counsel, and further assumed the applicability of *Texas Department of Community Affairs* v. *Burdine*. Contrary to petitioner's contention (Pet. 9-10), the court of appeals concluded that the burden of proving that petitioner committed an

[7] Rule 301 provides in pertinent part that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion * * *." *Burdine* establishes that in employment discrimination actions maintained under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, once the plaintiff has established a prima facie case of discrimination, the burden that shifts to the defendant is merely one of "producing evidence" that is legally sufficient to raise "a genuine issue of fact as to whether it discriminated against the plaintiff," and that the "defendant need not persuade the court that it was actually motivated by the proffered reasons" (450 U.S. at 254-255).

unfair labor practice was borne by the General Counsel; no burden of proof was shifted to petitioner. Petitioner claims, nonetheless, that because it "introduced five factual issues" (*id.* at 11) upon which doubts as to the Union's majority support rested, the General Counsel was obliged to show that the petitioner's actions were not taken in good faith. But, even assuming, as the court of appeals did, that *Burdine* is controlling here, the Court's opinion makes clear that the burden of production cast upon a defendant by establishment of a prima facie case is to adduce evidence to explain its conduct that, if credited, would be "legally sufficient to justify a judgment for the defendant" (450 U.S. at 255).[8] In the

[8] Although the question is not properly presented by this case, we note that the Board does not agree that either Rule 301 or *Texas Department of Community Affairs* v. *Burdine* is applicable here. The presumption of continuing majority status formulated by the Board and approved by the courts is a substantive rule of law based upon the Board's expertise that implements the policies of the National Labor Relations Act, rather than an evidentiary or procedural rule that governs the presentation of evidence at a trial such as is governed by Rule 301. See, *e.g.*, *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 493 (1978); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 800, 804 (1945); *Big Y Foods, Inc.* v. *NLRB*, 651 F.2d 40, 45 (1st Cir. 1981); but see *Presbyterian/St. Luke's Medical Center* v. *NLRB*, 653 F.2d 450 (10th Cir. 1981), rehearing en banc granted (Jan. 5, 1982). Moreover, *Texas Department of Community Affairs* v. *Burdine* addresses the unique set of ultimate and intermediate burdens applicable in Title VII litigation under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and does not rest upon an interpretation of Rule 301. And, to the extent the Court drew upon common law teaching about the effect of a presumption (450 U.S. at 255 nn.8 & 10), it nonetheless made clear (*id.* at 254 n.7) that in *McDonnell Douglas Corp.* the Court had determined the appropriateness of this scheme for

setting of this case, as the court below recognized, this standard requires that the grounds for doubting the Union's majority support adduced by petitioner be sufficiently substantial to support a good faith *reasonable* doubt as to the Union's support. Plainly, neither *Burdine* nor Rule 301 supports petitioner's contention (Pet. 11) that, once it had identified any ground for doubting the Union's majority status, the General Counsel was obliged to prove that petitioner did not act in good faith. Such a rule would render the presumption subject to displacement by frivolous, irrelevant and insubstantial grounds for alleged doubt as to a union's majority status and would thus render the presumption nugatory.[9]

Title VII litigation. By contrast, in the present setting, the Court has recognized the Board's authority to adopt the rebuttable "presumption" of continuing majority support as a rule of substantive law, without limiting the effect of such a presumption in accordance with Rule 301. *Brooks* v. *NLRB*, *supra*, 348 U.S. at 104 ("This * * * is a matter appropriately determined by the Board's administrative authority").

We note as well that petitioner did not raise the issue of conformity with Rule 301 before the Board. Accordingly, petitioner is precluded by Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e), from raising that contention here. See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979).

[9] The courts of appeals have uniformly approved the Board's view that doubts as to a union's majority support must rest upon objectively adequate considerations. See, *e.g.*, *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1480-1481 (1969), enforced, 427 F.2d 1088 (4th Cir.), cert. denied, 398 U.S. 929 (1970); *Orion Corp.* v. *NLRB*, 515 F.2d 81, 85 (7th Cir. 1975) (collecting cases). And this Court has described the predicate for a refusal to bargain as resting upon "*fair* doubts about the union's continuing majority." *Brooks* v. *NLRB*, *supra*, 348 U.S. at 104 (emphasis added).

2. Petitioner's contention (Pet. 12-18) that this case requires the Court to resolve a split among the circuits as to the level of proof required to rebut the presumption of continuing majority support is unfounded. First, the unpublished memorandum decision below makes no reference to, and does not rest upon, the "clear, cogent, and convincing" evidence standard that petitioner attributes (Pet. 5) to the Ninth Circuit and several other courts of appeals. Indeed, petitioner acknowledges (*ibid.*) that the decision below nowhere enunciates this standard. Rather, petitioner's contention that the standard for rebutting the presumption of continuing support in issue here rests entirely on other decisions of the Ninth Circuit, and the tenuous observation that the Court below either cited those decisions or cited other cases that in turn cite the decisions that invoke the challenged standard (*ibid.*). In fact, the clear import of the decision of the court of appeals is that, judged by any standard, the evidence adduced by the petitioner was insufficient to rebut the presumption, because the grounds for doubt adduced were so insubtial as to be incapable of supporting a reasonable doubt as the Union's continuing majority support (Pet. App. 3). Accordingly, because the decision below does not rest upon the "clear, cogent and convincing" evidence test, this case affords no occasion to consider the alleged conflict among the circuits.[10]

[10] Petitioner's contention that there is a split in the circuits, with some circuits requiring a more onerous "clear, cogent and convincing" evidence standard and others requiring only a "reasonable" doubt, is based on semantic differences, rather than differences of substance. For instance, the Ninth Circuit, in *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293 (1978), cert. denied, 442 U.S. 921 (1979), described the requirement of clear, cogent and convincing evidence as being

3. The only question actually presented here is whether the Board and court below properly concluded that petitioner did not adduce legally suffi-

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"sufficient reliable evidence to cast serious doubt on the union's majority" (584 F.2d at 297 n.13). See also *Orion Corp.* v. *NLRB*, *supra*, 515 F.2d at 85.

In any event, none of the cases that in petitioner's view (Pet. 14-18) employ a standard less rigorous than that employed by the Ninth Circuit would support a finding of good faith doubt on the evidence here. In each case in which the employer's assertion of a good faith doubt was upheld, the employer, unlike petitioner, presented some objective evidence of actual loss of employee support for the Union. Thus, in *Automated Business Systems* v. *NLRB*, 497 F.2d 262, 264-265, 270 n.6 (6th Cir. 1974) (Pet. 15-16), the court found that the fact that a decertification petition had been filed and that the employer had been told that a majority of the employees supported the petition was sufficient evidence to uphold the employer's assertion of doubt. Compare *NLRB* v. *Washington Manor, Inc.*, 519 F.2d 750, 752-753 (6th Cir. 1975) (distinguishing *Automated Business Systems*). In *Lodges 1746 and 743, International Association of Machinists* v. *NLRB*, 416 F.2d 809, 812-813 (D.C. Cir. 1969), cert. denied, 396 U.S. 1058 (1970), the court relied on "admissions [by the Union of loss of majority status], tacit and express, and * * * the substantial decrease in checkoffs," in finding sufficient evidence to warrant a reasonable doubt of majority status. Compare *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d 380, 393-394 (D.C. Cir. 1972) (rejecting reliance on lack of support of a strike as evidence of repudiation of union). In *National Car Rental Systems, Inc.* v. *NLRB*, 594 F.2d 1203, 1206-1207 (8th Cir. 1979), the court found reliance on the total replacement of the work force by replacements who had to cross the Union's picket line to get to work to be sufficient evidence to support a good faith doubt. Compare *NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091-1092 (8th Cir. 1969) (reliance on lack of negotiations in context of employer unfair labor practices, expressed dissatisfaction with union of only 4-6 of 60-65

cient evidence to support its claim of a good faith doubt of the Union's majority status. This fact-bound issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the Board's finding is amply supported by the record. Petitioner failed to present any direct evidence that unit employees had abandoned the Union—indeed, no decertification petition was ever filed by employees, and Company negotiator Jones admitted (Tr. 190) that he was unaware of any employees who had withdrawn support from the Union. The possibility that two members of the bargaining committee may have lost interest in attending the bargaining sessions does not establish that they no longer supported the Union; much less does it imply a general loss of majority support. See *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 490 (2d Cir. 1975) ("[l]ack of interest in union activities * * * does not imply opposition to the union as bargaining representative").[11] The Company's reliance

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employees, and turnover, insufficient to support good faith doubt of majority). In *NLRB* v. *Frick Co.*, 423 F.2d 1327, 1332-1334 (3d Cir. 1970), the court, upholding the Board's order, rejected reliance on lack of support of a strike as evidence of good faith doubt.

[11] The absence of bargaining committee members Divan and Gomez from the bargaining sessions held after June does not even support the inference that the individuals had lost interest. After Lavendera's discharge (see note 8, *supra*), no one attending the sessions was able to translate the sessions into Spanish for the two Spanish-speaking members of the bargaining committee. Moreover, it became increasingly difficult for Divan and Gomez to attend the bargaining sessions after the negotiations were moved from South El Monte to Long Beach (Tr. 41-42, 160-161, 386-387, 390).

on the Union's alleged failure to hold employee meetings was also misplaced. As noted above the Union actively communicated with the unit employees both prior to and during the negotiations.[12] Similarly, the fact that the Union did not submit the Company's October 16 contract proposals to the unit employees for ratification was not evidence that the Union had lost the support of the employees. The Union's constitution provides that contract proposals must be presented to employees for ratification only when, "in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement" (GCX 18, at 74). Mordasini simply did not regard the Company's October proposals as "a final offer of settlement," nor did she believe that the negotiations between the Company and Union had been concluded (Tr. 385).[13]

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[12] As to the period from May to November, the Company failed to explain how the lack of employee meetings during that period could support a reasonable good faith doubt of the Union's majority status. There is no evidence that the Union failed to communicate with the employees during that period. And in light of Mordasini's persistent efforts to schedule bargaining sessions and to reach agreement on a bargaining contract, the Company could not reasonably contend that the Union had abandoned the employees. Similarly speculative was petitioner's reliance on the fact that the bargaining committee members were not replaced. Indeed petitioner's negotiator Jones had told Mordasini that it was not necessary to have the bargaining committee present during the negotiations, and Mordasini, after some investigation, discovered that it was not in fact unusual to conduct negotiations without a bargaining committee in attendance.

[13] Mordasini persistently sought to schedule bargaining sessions after Jones had orally presented the October 16, 1979 proposals, and she indicated in her February 7, 1980 letter to Jones that she believed "that with some effort, the contract

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

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negotiations * * * could be concluded" (Pet. App. 17; GCX 14). Petitioner's final allegation—that the Union failed to take any affirmative action to represent the unit employees after the Company had expressed its doubt of the Union's majority status is impermissibly based on events which allegedly occurred after its withdrawal of recognition. *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 301 n.25 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979).

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